STATE OF MICHIGAN

IN THE SUPREME COURT OF MICHIGAN

NATIONAL WINE & SPIRITS, INC., NWS MICHIGAN, INC., and NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiffs-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellee,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervening Defendant-Appellee.

Supreme Court Docket No.126121

Court of Appeals Docket No. 243524

Lower Court Case No. 02-13-CZ

126121

INTERVENING DEFENDANT-APPELLEE MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION'S SUPPLEMENTAL AUTHORITY REGARDING *GRANHOLM v HEALD*

Respectfully submitted,

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By Order dated December 27, 2004, this Court stayed Appellants' Application for Leave to Appeal on the basis that the Supreme Court had granted leave to appeal in a case captioned *Granholm v Heald* and that the decision by the Supreme Court in that case "**may** resolve an issue raised in the present application for leave to appeal". (Emphasis added.) On May 16, 2005, the Supreme Court issued its Opinion in *Granholm v Heald*, 544 U.S. ___ Supreme Court ____; L.Ed.2d ___ (2005) (copy attached).

As can be seen from a review of *Heald*, it was a narrow decision that has no relevancy to the particular facts of this case, other than that the *Heald* decision reaffirmed that "states may . . . assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier [distribution] system". Id. at 25. In fact, the *Heald* decision recognized that the licensed "three-tier [liquor distribution] system itself is 'unquestionably legitimate'" . Id at 26. *Heald* is a very narrow decision that involved Michigan's treatment of wine **producers** (not distributors) and held, in essence, that because Michigan's statutory scheme specifically allowed in-state wineries to direct ship their product to Michigan residents, but did not allow out-of-state wineries any ability to direct-ship their products, the facial discrimination against producers found in the Michigan statute violated the dormant commerce clause. The narrow holding of the *Heald* decision was demonstrated in the second to the last paragraph of the decision (page 30) where the Court stated:

> States have broad power to regulate liquor under §2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

As discussed more fully below and in the initial briefs filed by the Appellees, this case does not involve disparate treatment of out-of-state producers of alcoholic beverages. Rather, it involves how the State of Michigan wants to distribute spirits (the State owns) and how it wants to structure its "unquestionably legitimate", licensed three-tier distribution system. *Heald* recognized that states have the right to distribute alcoholic beverages themselves (Michigan does that through its Authorized Distribution Agents (ADAs) with regard to spirits) or to set up a three-tier licensed distribution system for alcoholic beverages (which Michigan does for wine and beer). Importantly, the majority opinion in *Heald* stated:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. **This does not follow from our holding. "The Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal, supra*, at 110.** A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. **States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S., at 432. See also *id.*, at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler").** State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment. (Id. at 30; emphasis added.)

In light of the foregoing quote, there is nothing in *Heald* that in anyway impacts the statute at issue here. Indeed, *Heald* has no application to the instant case because as both

lower courts recognized, Michigan does **not** treat out-of-state distributors any differently than in-state distributors. In fact, the lower courts recognized that the challenged statute is facially neutral and does not treat in-state companies differently than out-of-state entities. Appellants certainly cannot claim that Michigan forecloses out-of-state companies from entering the market, since Appellant National Wine & Spirits ("NWS") is an out-of-state corporation that (through an affiliated company, NWS Michigan, Inc.) became an ADA in 1996 and NWS could have become a wine wholesaler at any time **prior** to 1996, just as it (through an affiliated company, National Wine & Spirits, LLC) did after 1999.[1]

As noted, *Heald* turned on a finding that a statute affecting wine producers (not the structure of the three-tiered distribution system) was discriminatory on its face. Appellants ignore the fact that there is absolutely no disparate treatment of out of state entities in the statute they challenge. As noted by the trial court:

> Now, I understand the Plaintiff's [Appellants'] argument, that because they were not participating at the cut off date they became forever ineligible to be grandfathered, and that they are an out-of-state firm. I understand that argument, and certainly the statute appears to have that effect, but **it [the statute] has that effect on any entity, any institution, any company that would have been in the same position as the Plaintiff. It doesn't single out the Plaintiff and it doesn't single out out-of-state companies.**
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> * * *
>
> **The statute is facially neutral. The statute does not on its own terms discriminate in any way between out-of-state entities.** August 14 , 2002, Trial Tr., pp 18-20. (Emphasis supplied.)

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[1] Appellants' reference to the one-year residency requirement for a wholesale license in no way prevents anyone from being a wholesaler and, in fact, Appellants are licensed in Michigan. More importantly, the constitutionality of MCL 436.1601 was **not** challenged in the trial court and, therefore, is not an issue on appeal. See *Swickard v Wayne County Medical Examiner*, 438 Mich 536 (1991) (issues not decided by circuit courts were not present for appeal).

The Court of Appeals reached the same conclusion, when it stated:

> **MCL 436.1205(3) does not discriminate against out-of-state economic interests.** The statute is but one provision of a comprehensive system that regulates the flow of all Liquor into and within the state. MCL 436.1205(3) applies to both out-of-state and in-state ADA's. Plaintiff's assert that defendant inserted the date in the statute to discriminate against out-of-state ADA/wholesalers because it "knew" that before that date all ADA/wholesalers were in-state entities. But plaintiffs present no evidence of the Legislature's intent, instead they rely on more speculation.
>
> * * *
>
> **Our next determination is whether the statute regulates evenhandedly with only incidental effects an interstate commerce. We conclude that plaintiffs have failed to establish that the statute has even an incidental effect on interstate commerce, i.e. "the interstate flow of articles of commerce."**
>
> * * *
>
> **Thus, we discern no indication that the statute prohibits the flow of interstate goods, places an added cost on them or distinguishes between them in the market. The Commerce Clause "protects the interstate market, not particular interstate firm, from prohibitive or burdensome regulations." Exxon, supra at 217-218.**
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> The fact that the statute prohibits plaintiffs from dualing does not implicate the Commerce Clause. Therefore, the circuit court did not err in granting defendant's motion for summary disposition of plaintiffs' Commerce Clause claim. (Emphasis supplied.)

CONCLUSION

Appellants apparently believe that if they keep repeating an erroneous proposition often enough, they might get someone to eventually believe it is a "fact". This Court should reject Appellants' invitation.

The facts of this case do not in any way resemble those in *Heald*. As noted by both the trial court and the Court of Appeals there is no disparate treatment as was at issue in

Heald. If anything, the *Heald* decision supports Appellees, since it affirms that under the Twenty-first Amendment states have the right to regulate alcoholic liquor through a state licensed distribution system a system that the *Heald* Court said was "unquestionably legitimate".

Appellee requests that the Application be denied.

Respectfully submitted,

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Dated: May 27, 2005

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